SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 298

C. A. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Facts.

At the very outset of the case, the Government introduced a sheaf of records and documents bearing upon each of the counts. (See exhibits). These documents, in brief, were a contract carrying the specifications—and in connection therewith it was proved that the duly qualified and assigned inspectors of the Bureau of Animal Industry were furnished with the contract and had full knowledge of the specifications required thereby and were required to inspect all deliveries and determine whether or not what was received met such specifications. (T. of R. pp. 61, 74, 82, 84). The contract having been shown, they introduced the original order form signed by the supply officer, George A. Johnson, upon which form, after the fish had been delivered and passed by the inspector for the B. A. I. at the point of

first delivery, a certificate of inspection was signed by the supply officer, George A. Johnson, showing that the order had been filled in accordance with the contract and met the specifications both as to quality and quantity and in accordance with the Navy regulations. (See Exhibit).

They then introduced what they called a copy of a public voucher form, upon which again there had been signed an inspection report to the same effect as that placed upon the original order form. (See Exhibit).

Following that, the delivery slip in each instance as to these counts was introduced in evidence, upon which there appeared a certificate by the duly authorized inspector of the B. A. I. designated and required to make the initial inspection at the point of delivery, signed by the inspector, which certified that the product described on the delivery slip had been inspected and "found to comply with the specifications of the United States Navy," (See Exhibit) and in that connection, the undisputed evidence was that the specifications referred to the contract itself, of which the inspector was fully informed.

While this evidence was being presented, and in order to make the picture more complete, counsel called for the log books (See Exhibit) used by the inspectors at the point of initial delivery and initial inspection and the daily report sheets made by the same inspectors. Here the inspectors involved were Davis and Edwards. With some reluctance, the Government produced the log books, which carried definite evidence that the product that was ordered had been received and met inspection specifications, even to the extent of written words on the log books "fresh fish." For some reason the Government never has, although the Court directed it to do so, produced the daily report sheets which the undisputed evidence shows would have been further written, documentary evidence in the handwriting of these inspectors, sent to their department, that the goods that

had been ordered were received and met the specifications in the contract.

The chain of circumstances which the Government was permitted to introduce starts in 1939, during the time that the witness Mrs. Oliver was employed by the accused, she having left his employment January 6, 1940 (T. of R. p. 41) —approximately a year and a half before the incidents alleged in the fourth count of the indictment, and even longer before those alleged in the fifth count. Her testimony was offered mainly to support the testimony of Mr. Connor, an accountant of the Federal Bureau of Investigation (T. of R. p. 11) both of whom testified that the daily sales of the accused ran approximately $30.00, outside of Government sales (T. of R. pp. 11, 12 and exhibits). It developed that both the testimony of Mrs. Oliver and that of Mr. Connor was in fact untrue. Mrs. Oliver's own records that were shown to her and that she admitted and that were introduced proved her own statement untrue (See exhibits) and the testimony of Mr. Connor turned out to be an admitted mistake on his part, even though he originally said that he had examined the books throughout the period of 1940 and 1941 and testified that the average daily sales during the period amounted to $25.00 or $30.00; yet when the facts appeared he had to admit that he was wrong because he had only examined two months of sales during 1940, and they were the two smallest months during the entire period of two years (T. of R. pp. 18-22).

Next the Government attempted to draw an inference of the delivery of bonito mackerel to the Government through the testimony of Floyd T. Musselman (T. of R. pp. 10 et seq.) and the records of the Tidewater Freezer, conjoined with the testimony of a drayman named Hunter (T. of R. pp. 23 et seq.). It must be remembered that all of the records of the freezer during the period involved were commandeered by the Federal Bureau of Investigation, and

instead of introducing the records of the freezer during the period mentioned, they introduced certain exhibits from them. All it amounted to was that amounts of bonito mackerel had been withdrawn from the freezer, which would have permitted that amount of bonito mackerel to be delivered instead of Spanish mackerel, but they could not follow the bonito mackerel any farther than the door of the freezer, and the witness Hunter did not know what kind of fish he took from the freezer or what he had delivered to the Naval Training Station. There is no testimony that any frozen fish had ever been delivered or even seen at the Naval Training Station during the period.

Herman Strock, a lieutenant of the Supply Corps, testified that on one occasion of a delivery from Mr. Roberts ten or twelve people around the platform had an argument as to whether it was bonito mackerel or Spanish mackerel, and although he himself did not know anything about the fish business and had never been engaged in it, and knew practically nothing about fish, he thought it was bonito mackerel; that he had been taken by Mr. Osborne, the F. B. I. agent, to the freezer just a short time before the trial and shown the distinction between a bonito mackerel and a Spanish mackerel—this about a year after the argument mentioned (T. of R. pp. 31-32). He, however, saw no frozen bonito. He further said that the people on the platform who said they knew something about the fish business said that the delivery was Spanish mackerel and not bonito mackerel (T. of R. p. 33).

The same situation developed as to the witness Elmer G. Dutton, a butcher, who also had been coached at the Tidewater Freezer, who said:

> "I worked down at the butcher shop, and I never paid much attention to dates" (T. of R. p. 37).

He could not tell whether what he thought was bonito mackerel was seen in the winter time or the summer time—it might have been January, as far as he knew.

It never appeared from either of the witnesses that any frozen or thawed bonito mackerel had been seen at the Naval Training Station.

Next the Government called several fish dealers, and their testimony is of no particular significance, except that they testified that there was a difference in the price of Spanish mackerel and bonito mackerel.

The witness, M. E. Gray, an engineer at the Tidewater Freezer, was allowed to testify with reference to a conversation with Mr. Roberts. When he was asked what the conversation consisted of, he first said:

> "A. Well, I don't know, to tell you the truth. One evening there I went up to see my uncle, and he came by and asked me, said he wished that I hadn't told this F. B. I. man what I had and said 'it looked like it was his luck to get caught at it, anyway' " (T. of R. p. 38).

and added that his uncle had sent word to him that Mr. Roberts wanted to see him and he went down to see what he wanted, and when asked what Mr. Roberts wanted, the witness said:

> "A. Well, nothing more than he just asked me what I had told the F. B. I. man" (T. of R. p. 39).

The Government did not attempt to show what this referred to and did not ask the witness what it referred to.

This witness was an engineer and worked one month at night and one month during the day and did not know anything about the withdrawals or where they went.

He also gave testimony that during the period he was there the accused continuously was permitted to and did bring into the Tidewater Freezer large amounts of fresh

fish, which were there prepared, boxed and iced and delivered without ever entering the freezer itself (T. of R. p. 39).

The Government then called B. A. I. inspector Oldham (R. p. 41). He did not testify to anything against the accused. His testimony supports that of inspectors Davis and Edwards as to the methods used by the B. A. I. inspectors; that is to say, when deliveries did not meet the required specifications in the Naval contracts, they were rejected.

The Government called J. R. Jenkins, Assistant Cashier of the Morris Plan Bank (T. of R. p. 42), Norman G. Poerstal, Manager of the Installment Loan Department of the National Bank of Commerce (T. of R. p. 44) and Mrs. Drewry D. Brown, Manager of the National Small Loan Society (T. of R. p. 48). These witnesses testified that Roberts had at one time endorsed a note for Davis (when Davis was not working at the Base) together with Pincus Silverman, at the Morris Plan Bank in the sum of $800.00, and that in August, 1939, at the same bank, inspector Edwards had financed an automobile and had executed notes jointly with his wife, and gave as references C. A. Roberts and the R. B. Twine Company; that at the National Bank of Commerce the accused in November, 1939, had endorsed a note for $162.00, which was signed by Albert M. Edwards and his wife, and that when the payments became in arrears after nine months Roberts was notified of the arrears, and that the last three payments were paid either by Roberts or his representative; (the undisputed testimony, however, by witnesses having knowledge of it is that the money was furnished by Edwards, himself, to pay this note) and that at the National Small Loan Society in December, 1939, Mr. Edwards had borrowed $60.00 and had given several business references, namely, Kline Chevrolet, Morris Plan Bank

and Consumers Finance, and names of friends as C. A. Roberts, Francis Hendron and George Davis.

The last witness offered by the Government was Johnnie M. Hunt (T. of R. p. 50) at the time of the alleged occurrences Chief Commissary Steward at the Naval Training Station. He was permitted, over objection and exception, to testify that the accused gave him 10% of the amount of the orders received from the Naval Training Station (T. of R. p. 53), but that such gratuity was solely for the purpose of getting orders and had nothing to do with the specifications of the fish or the quality thereof, and was based purely on the profit that he might make out of getting the orders and had nothing to do with the transactions otherwise (T. of R. pp. 59-60).

This, briefly, was the case presented by the prosecution.

Motion for a directed verdict having been overruled, the defendant proceeded with his testimony.

First, the two B. A. I. inspectors, Davis (T. of R. p. 60) and Edwards (T. of R. p. 72) were called. Both testified that they had been in the service a long number of years, that they had been completely trained in the inspection of fish and had full information as to specifications under the contract and a copy of the order in each case, and that inspections were made in accordance with regulations and in each instance the Government received exactly what the contract specified, and what was ordered; that during the period of time involved an investigation was going on about Norfolk merchants and that strange faces appeared from time to time around building 99, where the inspections took place. They explained their transactions with the financial institutions and said that these transactions had nothing to do with, nor did they influence the performance of their duties (Davis, T. of R. p. 63, Edwards, T. of R. p. 75).

Mr. Walter Edwards, certified public accountant of Norfolk (T. of R. pp. 93-101) was called and, in short, testified

as to statements and facts which refuted the testimony of the Government's accountant, Connor, and the witness Mrs. Oliver, and introduced into the record tabulations of daily sales as distinguished from Government sales (T. of R. pp. 94, 95, 98, 99).

This witness upon cross-examination was asked about each of the items in all five counts by having the accountant examine the records and determine whether or not the outside sales were of sufficient amount to take care of the withdrawals from the freezer. He did not, however, go into the question of consigned goods, nor did he go into the various miscellaneous items on the books such as deposits and miscellaneous collections, which would have shown various amounts much in excess of the items referred to in the questions, nor did he make any reference to the tabulations above referred to.

W. W. Bloxom (T. of R. p. 85), an employee, and Miss Mildred Fisher (T. of R. p. 101), bookkeeper for th accused, gave undisputed testimony that during the time involved in the indictment there had been both large and small amounts of consignments of bonito mackerel to other dealers in the surrounding country and even to dealers out of the state (Fisher, T. of R. pp. 102-105; Bloxom, T. of R. pp. 87-90). Bloxom also testified that he and the son of the accused, Roger Roberts (at the time of the trial in the military service and unavailable) accompanied deliveries of fish to the Base and in each instance deliveries were made in accordance with the orders and due inspection was made by the B. A. I. inspectors (T. of R. pp. 86-87).

The witness, C. S. Whitehurst, Vice-President of the National Bank of Commerce (T. of R. p. 84), was called to testify to the reputation of the accused for honesty and fair dealing, but the Court refused to allow him to testify (T. of R. pp. 84-85) and this refusal, together with other circum-

stances surrounding it, is made the subject of one of the bills of exception.

R. C. Davis, Assistant Manager of the Tidewater Freezer, testified that the accused handled not only frozen fish, but he continuously had the use of the cooling room during the period of time involved, and had access to and caused large quantities of fish to be brought to the cooling room at the plant and there conditioned, boxed, iced and delivered, without going into the freezer, and that such amounts would run as high as 20,000 pounds a day.

The Witness, H. W. Persons, testified that for several years prior to 1938 he was with the Tidewater Freezer and that the accused during that time brought into the cooling room of the freezer large amounts of fish, which would be conditioned and shipped out without going into the freezer, and that the accused had always had a key to the place so he could get in at any time during the day or night. (T. of R. pp. 90-91. This of course did not refer to the freezer part.)

The witness, J. M. Harris, for 22 years inspector in charge of the governmental department known as the Bureau of Animal Industry, up to 1939, testified that for the last few years of his service he knew both Mr. Davis and Mr. Edwards and they had good reputations (T. of R. pp. 92-93).

The accused did not take the stand, for reasons that will appear in the discussion of Bill of Exception Number 5.

Archie B. Brown, in answer to the Court's question, testified that C. A. Roberts was an honest man (T. of R. p. 101).

ARGUMENT.

For convenient reference, the assignments of error have been inserted at the beginning of the appendix.

The Verdict and Judgment Is Contrary to the Law and the Evidence and Is Without Evidence to Support It. Bill of Exception Number 2.

While the charge in this case is the presentation of a false claim against the Government, knowing it to be false, the indictment contains allegations upon which this charge is based, and from that the issue is made clear; that is to say, the Government must establish beyond all reasonable doubt, as to the two counts upon which the accused was found guilty, that he substituted frozen (thawed) bonito mackerel in lieu of fresh chilled Spanish mackerel, and to establish by clear and convincing evidence, beyond all reasonable doubt, that the Government's records and certificates (five or more in number) that are presumptively true are in fact untrue and false.

An attempt was made by the Government to prove this through a form of inference based entirely upon unrelated circumstances. The main theory that the accused could not have disposed of the frozen bonito mackerel that he withdrew from the Tidewater Freezer except to the Government was founded upon the idea that he could not have disposed of them otherwise because his business other than government business did not amount to more than an average of $25.00 or $30.00 a day. This theory was exploded by the testimony of the Government F. B. I. accountant during the trial and by absolute proof that his testimony was untrue, and it was further proved to be untrue by the undisputed evidence that large and various consignment of bonito mackerel had been sent to other dealers in this area of the country. The attempt to base an inference upon

the books also failed because all the items were not taken into consideration.

The next attempt to draw an inference of guilt was based upon the withdrawal by the accused of frozen bonito mackerel from the Tidewater Freezer by offering evidence of sufficient withdrawals to have enabled the accused to send a like amount of frozen bonito mackerel to the Naval Training Station. This theory was exploded not only by the failure of the accountant Connor and the undisputed fact that the outside business, together with the consignments, would account for all the bonito mackerel withdrawn, but by the further fact that, although they introduced the drayman Hunter, who hauled some portion of the fish for the accused from the freezer, he did not know whether he had hauled fresh fish that had been placed in the freezer and conditioned for delivery or whether he had hauled frozen fish, nor did he know to what place he took any one or more deliveries.

The next unrelated circumstance was the attempt to show by a Lieutenant Strock and the butcher Dutton that bonito mackerel had been seen at some time or other at the Naval Training Station. All that Strock's testimony amounted to was that there was an argument about one of Roberts' deliveries and that, while he thought the fish was bonito mackerel, the others there, who said they knew something about the fish business and about fish, which he did not know, said that it was Spanish mackerel. All of them of course considered it fresh fish because that is what the records show, and there is no evidence to the contrary.

Dutton said he paid no attention to the time and it might have been in the winter time or the summer time—it might have been in January, so far as he knew.

So it is clear that there is no evidence that the frozen bonito mackerel taken from the Tidewater Freezer during the time involved in the fourth and fifth counts of this in-

dictment, or at any time, in fact, reached the Naval Training Station. There is no follow-up or identification of any shipment or any load or any delivery mentioned in the indictment or introduced in evidence that connects up any of them with the testimony or either of these men.

They then tried to draw an inference from a conversation that Roberts had with M. E. Gray. When Gray was asked about this conversation he said, among other things, "Well, I don't know, to tell you the truth," and when he was asked what Roberts wanted to know from him he said, "Well, nothing more than he just asked me what I had told the F. B. I. man," and upon some further questioning he said that when he was talking to his uncle he said it looked like it was his luck to get caught at it, any way. It is supposed that he meant that Roberts said that, but there was no attempt to have this witness explain what he was talking about or when it was said or whether it had anything to do with any particular transaction, or whether it was with reference to something entirely foreign to the case here being considered. It is to be assumed that the witness did not know what was referred to, or if he did know, it was something other than the question here under consideration, because the Government did not ask what the conversation referred to; he was a Government witness, and the failure to ask the question raises the presumption that the answer to such a question would have been unfavorable.

The testimony of the B. A. I. inspector Oldham merely corroborated the fact that the records of inspectors Davis and Edwards followed the usual course, that they were capable and competent men and that when deliveries were not up to specifications they were rejected.

The testimony of the three witnesses connected with the financial institutions in Norfolk was a weak attempt to discredit the testimony of inspectors Davis and Edwards,

whom the Government should have called, but they knew they would be called by the accused.

Then there was an attempt to draw an inference from the testimony of Mrs. Oliver, who tried to coroborate the F. B. I. accountant Connor, but failed because her own records clearly demonstrated that her statements were not true, and further and beyond that, her testimony referred to the year 1939—approximately a year and a half before any of the charges herein made. Her testimony ought not to have been allowed at all, but even when considered, it has no probative value.

Finally, the Government attempted to draw an inference of guilt from the totally disassociated and collateral testimony of Johnnie M. Hunt, who was permitted to testify that the accused had offered him 10% of the amount of orders from the Naval Training Station, and that thereafter Roberts had given him from $200 to $400 a month, covering the time alleged in all five counts of the indictment. This testimony should not have been allowed because Hunt, himself, said the money that was given was solely for the purpose of getting business, having nothing to do with the specifications and quality of the fish, and being purely on the basis of the profit that the accused would secure out of getting the orders, and that no mention had ever been made by Roberts or anybody else at the Naval Training Station about passing anything that was not up to specifications.

The introduction of this testimony was highly prejudicial and tended to influence and inflame the minds of the jury and cause them to turn completely against the accused on the theory that he was making undue wartime profits by underhanded means, and it is totally foreign to the charge here. It is not even a similar circumstance, and the accused was placed in the position where his counsel could not place him on the witness stand because he would then be required to answer questions with reference to that money, on the

theory that the Court had held that this evidence was material to the issue, and if he had denied it, the jury would not have believed him, because the Court, the jury and all the people of this Tidewater area know that for years this practice has gone on and that it is as old as the oldest Chinese custom, where it was known in the early ages as "cumshaw;" and if he admitted it he was subject to indictment, and no doubt would have been indicted under another section of the United States Code, indictments on similar charges being pending against other merchants in this area. This is the subject matter of a specific bill of exception.

When you consider this case aside from the inferences and unrelated circumstances, along with the fact that the Government's own records introduced in evidence disproved not only the fourth and fifth counts, but all the counts of the indictment, it is apparent that there was a total failure of the required proof of guilt. These records, documents and certificates will be exhibited to the Court upon oral argument.

The discussion hereafter will further disclose the total failure to show guilt by the required degree of proof.

This being so, the Court should have directed a verdict at the end of the testimony offered by the Government and at the end of all the testimony, and should have granted the motion of the accused to set aside the verdict and dismiss the indictment.

Motion in Arrest of Judgment. Denial of the Motion for Bill of Particulars, Giving the Name of the Officer to Whom the Alleged False Claim Was Presented and the Name of the Officer Who Ordered the Supplies.

Bill of Exception Number 1

These two matters are properly considered together.

The charge against the accused is based upon the following provisions of Title 18, U. S. C. A., Section 80, as amended:

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent, * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

This Title 18, Section 80, was amended as late as 1938, but the amendment does not pertain to the charge made here. There has been no change in any form of that portion of the act upon which the accused is herein charged. This has been carefully checked.

We are comparing now the charge in the indictment. All five counts are in the same language, and the charge is "did unlawfully, knowingly and feloniously present and cause to be presented to the Department of the Navy of the United States through the Naval Training Station of the United States, for payment, a false, fictitious and fradulent claim against the Government of the United States * * * well knowing such claim to be false, fictitious and fraudulent."

Recapitulated, the charge is that the accused presented to the Navy Department of the United States a false, fictitious and fraudulent claim against the United States, well knowing the same to be false.

This charge does not come substantially within the language of the section. The section contemplates that the claim shall be presented, first, to a person or officer of the Government and, second, that he is possessed of due authority to approve or pay the same.

Neither of these two essential elements of the crime definitely set forth in the section is embodied in the indictment.

This being so, the indictment is fatally defective under the decisions. A careful examination of the annotations following Title 18, Section 80, U. S. C. A., and the Federal Digest to date, reveals the rule under this section to be definite, and it is "the omission to state the persons to whom the claim was, or was to be, presented, is fatal." *United States* v. *Wallace,* 40 Fed. 144, at page 147. After quoting the statute, the Court said:

> "This being so, the omission to state the person to whom the claim was, or was to be, presented is fatal. * * * To complete the offense, therefore, it must be proved that the false vouchers, etc., were prepared for the purpose of presenting the false claim for payment or approval to or by *any person or officer* in the service of the United States *authorized to approve, audit, or pay the same;* and if this is to be proved, it must be alleged." (Italics ours).

In the case of *United States* v. *Christopherson,* 261 F. Rep. 225, the Court said:

> "While the language of the statute merely makes it an offense to present a false voucher to any civil, military or naval officer, yet obviously by this language is meant that the officer to whom such voucher shall be presented must be a civil, military, or naval officer, clothed with power to approve and pay the same. Otherwise, the mere presentation of a false voucher to any officer of the United States, military, naval or civil, would be a crime, whether such officer had authority to act in the premises or not. Such condition is unthinkable. I am of opinion that the ruled cases require that an apt allegation of such authority ought to be made in each of the five counts of the indictment." Citing cases, among them *United States* v. *Wallace, supra.*
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> "* * * I therefore hold that an apt allegation that the officer, to whom the voucher in question was pre-

sented, was vested with authority to approve for payment, or to pay such voucher, was necessary, and that lacking such allegation the indictment as to each of the five counts thereof is in this behalf defective."

It would serve no good purpose to discuss the other cases because they would not do other than to confirm the rule above stated.

An examination of the federal statutes to date and the original annotations following Title 18, Section 80, together with the annotations supplied for use during 1943 contained in the pocket supplement of the Code, do not disclose any cases to the contrary. The original annotation under Title 18, Section 80, is item 37 of the note following the section. There is only one case embodied under this heading of the annotation for use during 1943, *United States* v. *Crittenden*, 24 F. Supp. 84, which is not pertinent here because it deals with pensions and says that an indictment charging a committee charged with estates of incompetent world war veterans presented false affidavits concerning pending proceedings brought in the state court by Veterans Administration compelling the committee to account, charged no violation of this section.

In this connection, it is sometimes said that the filing of a demurrer is better practice than that of making a motion in arrest of judgment. However, depending upon the nature of the case and the circumstances, counsel sometimes has to determine which he shall do—whether to file a demurrer or wait until after the trial and file a motion in arrest of judgment, either of which he has an absolute right to do in determining the manner in which he will attempt to protect and defend the accused.

In this case no delay of the trial was considered advisable and, with that in mind, counsel for the accused made a motion for the Court to enter an order requiring the United States of America to give, as to each count,

the exact date upon which the alleged false claim was presented and to whom it was presented, which the Court denied. (There were some other requests in the motion for a bill of particulars that were denied, and only one which was granted, and that was item d, which required the Government to furnish the date and amount of bills). Of course this refusal to require the District Attorney to furnish on behalf of the Government the name of the officer to whom the alleged false claim was presented, was based upon the objection of the District Attorney to do so. The objection of the District Attorney to giving the name of the officer to whom the alleged false claim was presented was not at the time apparent, but it did become apparent during the course of the trial, and the conduct of the Government amounted to an improper withholding not only of the name asked for, but of its intention to allege by inference that the supply officer who ordered, received and inspected the supplies furnished by the accused acted in unison with the accused to defraud the Government by certifying that the exact product ordered was received and that it met the specifications under the contract through which it was furnished. This appears to have been done with the full intention of not calling the supply officer in this case, George A. Johnson, and as the case developed, the District Attorney laid great stress on the fact that George A. Johnson not only made certificates as to the various orders under counts 4 and 5, upon which the jury found the accused guilty, but that he certified all the orders and deliveries furnished as to all five of the counts except the first order in January, 1940. This even went so far as to lead the Court into what we believe was error in its charge, wherein the Court commented upon this fact.

These observations are made for the purpose of clearly demonstrating to the Court the wisdom and correctness

of the established rule applied to Title 18, Section 80. It is specified in its terms and the decisions are specific in saying what the indictment must contain and what it is incumbent upon the Government to prove.

This situation made it extremely difficult for counsel in his endeavor to properly prepare and concert a defense, as was clearly apparent during the course of the trial. The combined failure to insert in the indictment the name and authority of the officer to whom the claim was presented and the refusal of the Court to require the District Attorney to furnish a bill of particulars, and the subsequent failure of the District Attorney to call that officer to the witness stand was manifestly wrong and highly prejudicial to the accused and was in direct disregard of the duty of the Government to present all the evidence in the case. This duty has been established for ages and was confirmed by the recent case of *United States* v. *Palese,* 133 F. (2d), p. 600, decided January 25, 1943, as follows:

> "* * * It is the duty of the prosecution in a criminal trial to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused."

Motion for a New Trial On After Discovered Evidence.

Inserted in the record (p. 116) is a copy of the affidavit upon which the motion to grant the defendant a new trial on the ground of after discovered evidence is based. The reading of the affidavit, itself, is sufficient to demonstrate the correctness of the contention that the accused did not have a fair and impartial trial and was deprived by the manner in which the case was conducted and the failure of the Government to produce evidence within its possession, of the benefits of the evidence set forth in the affidavit itself.

The Government would not furnish any information by way of a bill of particulars until argument had been had thereon, and then the Government was required only to produce inspection records, and it was not until about a week before the trial that the accused or his counsel knew that George A. Johnson was a supply officer and had issued certificates of inspection. It was not known that George A. Johnson issued the certificates upon the reports of duly qualified commissioned inspectors, until the witness George A. Johnson appeared in the trial of the case of Pannella on, to-wit, January 7th. In this case Commander Clarholm testified that the man who signed the certificate on the public voucher was the man who made the inspection. This appears now to be untrue from the testimony given under oath by George A. Johnson, the man who signed the certificate of inspection that the foods had been received and met the specification set forth in the contract between the accused and the Government. It is unbelievable that the Federal Bureau of Investigation did not know this, or if they did not know it they are guilty of inexcusable conduct.

It is deemed unnecessary to make an extensive argument upon this ground, because the mere appearance of this situation is sufficient to require a reversal in this case.

Error of the Court in Refusing to Allow Counsel for the Accused to Make Argument Based Upon the Evidence Adduced With Reference to the Failure of the Accused to Take the Witness Stand in His Own Behalf, Thereby Waiving Any Objection to Argument by the Attorney for the Government Contra.

Diligent inquiry has been made on this question.

Upon inqury the American Law Book Company wrote the following:

> "The restriction on comment is obviously for the benefit of accused and may be expressly waived."

The Lawyers Co-operative Publishing Company referred us to the case of *Commonwealth* v. *Wilhelm,* 90 Pa. Super. Ct. 473.

The West Publishing Company, after referring to cases where waiver had been held to exist because of the conduct of the accused or his counsel, quoted from 31 Michigan Law Review as follows:

> "As the authorities have said a thousand times and as everyone knows, the jury will draw some inference and that usually and inevitably will be against the defendant. Why should counsel for the defendant not be able to neutralize this feeling? Even of his own motion and when no comment is first made by the attorney for the prosecution, why should he not be allowed to call attention to the use, or other apparent handicaps which might induce the defendant to hesitate from becoming a witness, to subject himself to the embarrassment of cross-examination and to rely on the fundamental presumption of innocence and the duty of the state or of the prosecution to prove its case beyond a reasonable doubt? If, too, the State has clearly made no case at all, why should he not state that there is nothing to answer?"

We have been unable to find where this exact situation is recorded in the books. However, the Court, we think, ought to take judicial knowledge of the fact that from time to time in the trial of criminal cases, where counsel for the accused has opened up the subject, there is a waiver and the court would refuse to grant any instruction to the jury saying that the fact that he did not take the stand should not be considered as evidence against him, and that the prosecuting attorney would have a right to comment upon his failure to take the stand under these circumstances. We find the following statement in 23 C. J. Sec., p. 560, Sec. 1098:

> "*Waiver.* Where accused, trying his own case, explained why he did not take the stand, it was held that he waived his privilege and that the prosecuting attorney could comment on his failure to take the stand."

If the accused has a right himself, he also has a right through his counsel to waive this rule of law that is made only for his benefit.

Ordinarily, prosecuting attorneys like to have the privilege of calling the jury's attention to the fact that the accused does not take the stand, and ordinarily counsel for the accused has some hesitancy in asking the court for an instruction to the jury that the fact that he does not take the stand shall not be considered against him, because the mere mention by the court of the fact indelibly impresses upon the minds of the jury his failure to take the stand and, regardless of the Court's instruction, the jury—human as they are—cannot remove that fact from their minds.

The United States Circuit Court of Appeals in deciding this very important question, did so in the following language:

> "This was an unusual request and we are of the opinion that the Court properly denied it."

It is true that the request was unusual, but the circumstances of the case made it of prime importance to the accused, and it is of great importance that the question should be passed upon by this Court.

An unusual situation caused counsel to make the motion, as is reflected during the examination of C. S. Whitehurst, Vice-President of the National Bank of Commerce.

> "Q. How long have you known C. A. Roberts?
> A. Eight or ten years.
> Q. Do you know his general reputation for honesty and fair dealing?

The Court: Is the defendant going to take the stand?

Mr. Parsons: I have not asked the witness about his veracity, if your Honor please.

The Court: It is not proper unless the defendant is going to take the stand.

* * * * * * *

Mr. Parsons: The question was asked about the reputation of this gentleman for honesty and fair dealing, if your Honor please, and limited to that.

The Court: I think the Court is entitled to know whether he expects to take the stand or not. I have ruled in the past, in cases of that kind where they did not take the stand, that it was not proper.

Mr. Parsons: Well, sir, I am not in position to determine that question at this minute, and I reserve the right to put him on or take him off as the exigencies of the occasion may require. At this time I can only ask the question. I cannot answer you as to whether he will go on the stand" (R. 84-85).

All of this took place in the presence of the jury, but immediately after this occurrence the Court sent the jury out and there was considerable more discussion about it, at the end of which the Court said:

"The Court: If I find out between now and Monday that I am in error, I will permit it to be asked" (R. 169). "Let the jury come in."

This witness left the witness stand without being allowed to answer the question. Later in the proceedings the Court, after examination of authorities, decided that the question was proper and therefore some of the witnesses (but not Mr. Whitehurst) were permitted to testify as to the reputation of the accused for honesty and fair dealing. However, the colloquy between the Court and counsel in the presence of the jury as to whether the accused was going to take the stand had, in the opinion of counsel for the ac-

cused, so impressed itself upon the jury that it was in fact prejudicial, and counsel reached the conclusion that the best thing to do was to open up the subject entirely, because any statement from the Court in this regard was a definite indication to the jury that the accused, if he was offering evidence as to his honesty, should take the stand, and although the evidence was thereafter allowed, the jury's attention was never directed to the fact that it was an error. The witnesses thereafter were merely allowed to answer the question and counsel, being in somewhat of a quandary and feeling that it would be a disadvantage to his client to have a controversy between the Court and counsel by taking exception to the Court's ruling, and being cognizant of the fact that counsel are not always "*held to a strict accountability for failure to object or except when questions are asked by the Court,*" (*Williams* v. *United States,* 93 F. Rep. (2) 685, at p. 690 (7)) thought it was best to bring the matter before the Court, and it was done in the following manner:

> "The accused by counsel requests the privilege of arguing and presenting the fact to the jury that the accused did not take the stand, and to present the reasons therefor, based upon the evidence introduced in this case, and the accused is willing to waive any objection to Government counsel's arguing on the same question.
>
> The Court: The Court overrules the motion on the ground that under well recognized procedure in criminal cases it is not permissible or proper for the Government counsel ever to comment upon the failure of the accused to testify in his own behalf.
>
> Mr. Parsons: Exception."

See *McKnight* v. *United States,* 115 F. 972, at pages 982 and 983. Significantly, the Court there said:

> "As has been said in some authorities, after allusion has once been made to the right of the defendant to

testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him for his silence, when the law gives him the right to speak.

We are of the opinion that what was said by the trial judge in response to the objection of counsel as to the right of the defendant to testify was not cured by any subsequent statement to the jury upon that subject."

See *George E. Wilson* v. *United States*, 37 L. Ed. 650, at p. 652, 149 U. S. 60.
State v. *Valdoser*, 88 Iowa 55, 55 N. W. 97.

It was of course apparent that counsel for the accused wanted, among other things, to say to the jury that he did not take the witness stand because of the fact that the Court had ruled that the evidence that Johnnie M. Hunt had received money from the accused was material to the crime charged in the indictment and he would have been required to answer questions with reference to the collateral charge of bribery, for which he had not been indicted, which might tend to incriminate him in the case which the Government had a right to bring.

It was just another evidence of the wrong conduct against the accused when Johnnie M. Hunt was allowed to testify about the "cumshaw."

Although the books and digests do not appear to disclose any such situation ever to have existed before (and yet it may have) it must be apparent upon due consideration that counsel for the accused and the accused were placed at a definite disadvantage by the holding of the Court that Hunt's testimony as to receiving money from the accused was material, and when questions as to the honesty of the accused were presented, the Court by its own voluntary action definitely impressed upon the jury the question of whether or not the accused would take the witness stand. We doubt that any such situation has ever arisen in the trial

of any criminal case, and it seems to us that the only conclusion that can be reached under such circumstances is that it is unfair, and the only way in which it can be corrected is by the reversal of this case.

The Testimony of Johnnie M. Hunt.

Johnnie M. Hunt was allowed to testify, over the objection and exception of counsel, that while he was commissary steward at the Naval Training Station he met Mr. Roberts, about June 14, 1940, and after that time collected from two to three or four hundred dollars a month and took it to George A. Johnson, supply officer, and further:

> "Q. And you testified, did you not, that any money that was given was because of the fact that the man would give the money in order to get the order for the business?
>
> A. That's right.
>
> Q. It had nothing to do with the specifications of the fish, or any other product?
>
> A. No, sir.
>
> Q. Or the quality?
>
> A. No, sir.
>
> Q. It was purely on the basis of the profit that he might secure out of getting the order for that particular product?
>
> A. Yes, sir.
>
> Q. No mention was ever made by Roberts or anybody at the Base about passing anything that was not up to specifications, was there?
>
> A. No, sir" (T. of R. pp. 59-60).

It was contended, and is still contended, that this was purely a collateral matter and involved another entirely possible separate criminal charge against the accused, not even similar in nature, and as has now developed and is set forth in the affidavit of after-discovered evidence, the Government itself was in possession of testimony that would

have definitely shown that this payment of money had no relation to or connection with the ordering and delivery of fish by the accused. It is earnestly contended that it was highly prejudicial error to allow this testimony to be introduced. There was not a scintilla of evidence that the money was given with intent to cause inspectors to pass something other than what the Government specifications called for or to defraud the Government in any way, or that the Government was defrauded in any way, nor was there anything upon which to base any such inference. The Court permitted this evidence over the objection and exception of counsel by stating as follows:

> "The Court: There is a charge of fraud here, and other similar instances of fraud, or attempted fraud, may be shown to throw light, if they throw any light, on the intent with which the acts done in this case were done, if they were done" (T. of R. p. 53).

There appear to be various reasons why the Court was in error in this ruling. In the first place, Title 18, Section 80, upon which the charge here is based, does not contemplate proof of intention and does not use the ordinary expression placed in sundry statutes, "with intent," etc. It merely says:

> "Whoever shall * * * present * * * for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof * * * shall be fined not more than $10,000 or imprisonment not more than ten years, or both."

So the intent is inherent in the act itself and is not made a part of the statute. That is to say, when once the act has been proven to have been committed, intent follows as the night follows the day, and to offer evidence of a similar offense (and this is not even a similar offense) to prove the

intent with which the unlawful act was committed is erroneous and in this case was highly prejudicial and may be said to be inflammatory in the minds of the jury.

Furthermore, the attempted proof in this case is that C. A. Roberts delivered frozen (thawed) bonito mackerel in lieu of fresh chilled Spanish mackerel. This is the meat of the charge. He either did so or he did not do so. There is no ground for any exception or claim of inadvertence or mistake. If he withdrew the frozen bonito mackerel from the freezer and sent it to the Naval Training Station he was bound to have knowledge of it, inherent in the nature of the act itself.

In *MacDonald* v. *United States,* 264 F. 733, on a similar question the Court said:

> "* * * Guilty knowledge was not in issue under the facts established by the testimony in this case. The issue to be determined by the jury was not whether the defendant's knowledge was guilty or innocent, but whether he had any knowledge of the procurement of the counterfeit stamps and their use; and if they should find that he did have, then it necessarily followed that such knowledge must be guilty knowledge * * *
>
> As neither guilty knowledge nor intent were in issue, the instruction of the court that the jury might consider the transaction with Collette 'as throwing light upon whether he was innocent or guilty in his knowledge of this transaction' was, in effect, an instruction that they might consider it in determining whether MacDonald was innocent or guilty of being concerned in the conspiracy with which he was charged, and it seems to us that the jury must have so understood it."

The general rule as to the introduction of evidence of this nature, laid down by the Circuit Court of Appeals for this, the Fourth Circuit, is quoted from the case of *Simpkins* v. *United States,* 78 F. (2d) 594, as follows:

"It is a fundamental rule of criminal evidence frequently applied in both state and federal courts that proof of offenses other than those charged in the indictment is generally inadmissible and constitutes prejudicial error even though the separate offenses may be of a similar nature. Wigmore on Evidence (2d Ed.) Section 194; Cyc. of Fed. Procedure, Section 2257; Chamberlayne Modern Law of Evidence, Vol. 4, Section 3210; 16 C. J. 856; *Boyd* v. *United States*, 142 U. S. 450; 12 S. Ct. 292, 35 L. Ed. 1077; *Hall* v. *United States*, 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003."

See also *Boyer* v. *United States*, 132 F. (2d) 12;
Walker v. *United States*, 104 F. (2d) 465, at page 470 (14).

If it could be assumed that the Government established beyond a reasonable doubt that the defendant actually furnished a different and less valuable kind of fish than that contracted for and presented a false claim based thereupon, the motive and intent would be inherent in the act itself and there would be no reason for the introduction of evidence of similar offenses and certainly not unrelated and collateral matters, to show such intent.

See also *Sutherlands* v. *United States*, 92 F. (2d) 305;
Fabacher v. *United States*, 20 F. (2d) 736;
Smith v. *United States*, 10 F. (2d) 787;
Weil v. *United States*, 2 F. (2d) 145;
Steinberg v. *United States*, 14 F. (2d) 564;
Haynes v. *Commonwealth*, 194 Va. 854;
Limbaugh V. Commonwealth, 149 Va. 383;
United States v. *Mitchell*, 1 L. Ed. 410 and 1 L. Ed. 414.

Evidence in the case at bar that the defendant made payments to Hunt for orders without any request of Hunt to change the specifications or quality of fish from that specified in the contracts, and without any inspection or acceptance of fish by Hunt, could not have any relation to the

charge in the indictment that the defendant delivered a different quality of fish from that specified in the contract, and making claims and collecting for fish of the quality called for by the contract.

Testimony of Mrs. Edna Oliver.

The testimony of Mrs. Oliver shows that she left the employment of the accused at the beginning of January, 1940. The acts charged here in the fourth and fifth counts of the indictment are alleged to have taken place in July, 1941, and September, 1941.

She was permitted to testify with reference to hearing Mr. Roberts make statements to his employees upon the approach of any of the inspectors (Davis, Draper, Edwards and Oldham).

It is apparent that Mrs. Oliver knew nothing about anything that happened in 1941, but she was allowed, over objection and exception, to testify to occurrences that took place in 1939, with reference to the amount of average daily sales (which by a statement of hers later appeared to be untrue), the handling of fish in the back of the store, the coming into the store of B. A. I. inspectors, the giving of Christmas presents, etc., to them, and to the warnings given employees when the inspectors would appear (during the year 1939).

See *Boyer* v. *United States* 132 F. (2d) 12;
Walker v. *United States,* 104 F. (2d) 465, at p. 470 (14).

She was later called back and allowed to testify that a witness by the name of Bloxom had asked her if she had visitors, and she replied that she knew he meant F. B. I. and told him yes, and a further conversation she had with Mr. Bloxom, all of which was entirely collateral to the issue and was improper.

It afterwards appeared that she had had some trouble with the Roberts family, and was definitely a partisan witness. While her testimony ought not to have any particular value, yet the way in which it was brought in and set up before the jury was bound to be prejudicial. It is of course subject to the same objection, in a general way, as that heretofore stated to the testimony of Johnnie M. Hunt, based on the same line of authorities.

Errors of the Court in the Admission and Rejection of Evidence.

It would unduly lengthen this argument to attempt to discuss all the various objections and exceptions to the rulings with reference to the admission and rejection of evidence. Without waiving them, we will confine the discussion under this head to two situations that arose during the testimony of George D. Davis.

It will be remembered that the Government had introduced written records of inspections of Davis, Edwards and George A. Johnson, which contradicted the charges in the indictment, but the Court held that the Government should be allowed, under the circumstances, to attempt to prove that these records were false and untrue. Therefore, while the Government had proved that the fish ordered from and delivered by Roberts was of the exact quality and met the exact specifications under the Government contract and was presented and received at the front door and went through the usual process of inspection and examination after it had reached the kitchen, yet by the methods they used they, negatively speaking, tried to show by inference based upon collateral matters, and by an attempt to discredit the Government's long time inspectors by isolated inferences of association with the accused, that in fact, instead of the fish having entered by the front door, as indicated, they were actually delivered by the second story method through a

back window, and under these circumstances the following occurred upon the examination of inspector Davis:

> "Q. Have you ever committed any wrong or fraud against the Government?"

On objection the Court said:

> "The Court: It is too general, Mr. Parsons. It is for the jury to say, under these circumstances, whether he had committed any wrong against the Government or not" (T. of R. pp. 64-65).

It then appeared that Roberts had endorsed a note for Davis. Upon that the following question was asked:

> "Q. Did you feel any hesitancy as a friend to ask him to do that?
> A. No, sir, I did not.
>
> The Court: Well, he might not, but somebody else might take a different view of it.
> Mr. Parsons: My view is that what was in his mind would be controlling—not what somebody else would think.
> The Court: His standard might be different from other people's standards.
> Mr. Parsons: His standard might be different and still not be dishonorable.
> The Court: It is still not a proper question, Mr. Parsons" (T. of R. pp. 65-66).

It will be noted that these statements of the Court are entirely voluntary and were interposed in the case without any suggestion whatever from counsel for the Government. Following that, the witness was asked:

> "Q. What did you want to borrow the $800 for?"

Upon objection, the Court said:

"The Court: The material part is, why he went to the man whose goods he had to pass on for the Government" (T. of R. p. 66).

Then on cross-examination Government counsel asked:

"Q. Did you ever receive any money from ice cream manufacturers?
A. No, sir."

Upon objection, the Court said:

"The Court: His honesty as an inspector is involved in his testimony here. It may throw some light in aiding the jury in determining what weight they will give to his testimony" (T. of R. p. 69).

"Q. Did you ever have any argument with the manager there (referring to the ice cream manufacturer) about money?
A. No, sir.
Q. You never did?
A. No, sir.

Mr. Parsons: I take it, your Honor, that this relates only to his credibility.
The Court: It is only on the weight and credibility that the jury will give to his testimony.
Mr. Parsons: We except to the introduction of this evidence" (T. of R. pp. 69-70).

Now, bearing in mind that the Court (T. of R. p. 65) ruled that it was improper for counsel for the accused to ask the inspector whether he felt any hesitancy as a friend to ask Mr. Roberts to endorse his note, yet the Court of its own motion interposed the same question in another form as follows:

"By The Court: Didn't it embarrass you in any way to be inspecting the deliveries of a merchant, in circumstances like this, and having him endorse your note for

a substantial sum? Did it embarrass you in any way?

A. Your Honor, I was not on Navy work at the time.

Q. What work were you on?

A. My inspection work up town?

Q. For the Government?

A. Yes, sir; but I did not expect to go back to the Base.

Q. Well, you did go back to the Base later and inspect?

A. Yes, sir.

Q. Didn't it cause you any embarrassment or anything in the discharge of your duties?

A. Well, I thought about it quite a bit, but it didn't have any bearing on my inspections that I made at the Base" (T. of R. pp. 71-72).

See 95 A. L. R., p. 789 (III).

Counsel for the accused, himself, was placed in an embarrassing position by the circumstances just related. As has heretofore been pointed out, and as has been established by the decisions, and as is exemplified in the case of *Williams* v. *United States,* 93 F. (2d) 685, where the Court, after saying that the district judge who tried the case had an established reputation for fairness and judicial poise, further said:

"In the leading case of Adler v. United States, 5 Cir., 182 F. 464, 473, the court said:

'The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of opinion that the judge is permitted to take part impartially in the examination or cross-examina-

tion of witnesses, we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it.

'A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. *Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court.* If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so *inevitable*. Counsel are expected to maintain an attitude of deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, *if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case.* The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified in interfering with the judgment on account of this alone. *But in a case where there is substantial conflict in the evidence as to the essential*

> *points that were required to be submitted to the jury, the course of the judge in unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this grounds alone, to grant a new trial.'* " (Italics our own).

It is also to be noted in the italicized portion of the above quotation that, under such circumstances as in this case appear, "The defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions of opposing counsel, it will appear to the jury that there is a direct conflict between them and the court."

> See *Moss* v. *United States*, 132 F. (2d) 875, at p. 878, Headnotes 12-14;
> *Glover* v. *United States*, 147 F. 426;
> *Hibbard* v. *United States*, 172 F. 66, at p. 71 (4).

This same situation applies, of course, to the action of the Court here when the Court, of its own motion, interposed into the case a very hazardous question, when he demanded of counsel for the accused that an announcement be made as to whether or not the accused would take the witness stand.

In the light of the above decision and the citation referred to therein, it would seem superfluous to make any further extended argument to demonstrate that the Court, inadvertently and unintentionally of course, not only embarrassed counsel for the accused, but did things which were inconsistent with his own rulings and necessarily made some impression upon the jury as to his feeling and attitude in the case, and it is of course unnecessary to discuss the influence of the Court, which it aptly stated in the *Adler Case* above cited.

"The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury."

There can be no doubt that what the Court did as above indicated, with reference to the demand to know whether the accused was going to take the stand, made a deep impression upon the minds of the jury and was highly prejudicial to the accused.

Necessarily, where the Court interposed in the case and said things that were calculated to prejudice the jury against the inspectors—then witnesses—and imbuing them with the idea of the Court that they were guilty of dishonorable conduct in the performance of their duty while inspecting products delivered by the accused, it follows as a matter of course that it created a prejudicial attitude against the accused himself.

A similar situation arose in the case of *Jones* v. *La Crosse*, 180 Va. 406, decided December 7, 1942, where the accused was charged with operating a motor vehicle under the influence of liquor. The attorney for the Commonwealth asked one of the witnesses:

"Mr. Shaw, you have known Mr. Jones for some time, haven't you?

Yes.

You have seen Mr. Jones driving under the influence of whiskey before, haven't you?

Yes.

You have seen him under the influence of intoxicants, haven't you?

Yes.

And you have seen him sober?

Yes.

And he looks different now from what he did on the day of his arrest?

Yes."

Upon this the Court said:

> "The implications from the objectionable questions and answers could no more be overlooked by the jurors than could be obliterated the scars from nails withdrawn from the heart of an oak.
> * * * and it was prejudicial for the trial judge to intervene with questions relating to the same inadmissible evidence. The setting and background were such that the effort of the trial judge to remove the objectionable matter from the minds of the jury could not be expected to be successful."

In the case of *Taylor* v. *Commonwealth*, 180 Va. 413, decided on the same day, the Court observed:

> "The evidence here was such that the jury would have been warranted in finding either for or against the accused. The case was so doubtful that it required a close evaluation of the testimony including the appraisal of the credibility of the witnesses. The unwarranted questions and the ordinary implication to be drawn from them most likely cast a stigma on the character of the witnesses in the minds of the jury, and, this alone, easily could have been the deciding factor in the case resulting in a verdict of guilt."

Objections to the Charge.

Adding to the prejudicial effect of all the voluntary remarks of the Court and the rulings upon the evidence during the testimony of the Government inspectors, the Court further emphasized the impression made upon the jury then by a continuation of the circumstances in its charge with reference to the inspectors. After stating their obligation to faithfully and impartially perform their duty, he said:

> "* * * there seems to be no dispute about the notes and matters of that kind, while there is a dispute that the inspectors had been accepting free fish and accepting gifts, it is for you to determine, if all of these facts

are established by the evidence, how far that would affect those inspectors in the discharge of their duties in inspecting and passing upon fish tendered by the defendant under the contracts and the orders that are the subject of this indictment. It might be said that it is very doubtful that men in their position of trust and confidence ought ever to permit themselves to be put in a position that might embarrass them in the discharge of their duty. However, it is for you gentlemen, to pass upon and determine whether or not any such set of facts and circumstances, if established by the evidence, would be sufficient to impugn and set aside the effect of the certificates which they issued at the time these shipments of fish were sent down to the Naval Training Station." (T. of R. p. 136.)

To this charge the defendant by counsel took the following exception:

> "I except to your Honor's stating that it was 'doubtful whether men in the position of Edwards and Davis ought to permit themselves to be put in a position that might embarrass them in the discharge of their duty.'" (T. of R. p. 139.)

This charge we believe was erroneous, because it not only unduly again impressed the jury with the Court's view of the conduct of the inspectors, but it added that, if the jury believed the evidence about these inspectors, it would be sufficient to set aside the certificates which they had issued; that is to say, it would be sufficient evidence to prove that the certificates made by Davis and Edwards were actually false, even in the face of the fact that the evidence could only properly go to the credibility of the witness himself and was not substantive evidence to disprove the written inspection documents, including the log books and daily reports of the inspectors, showing that the charge made against the accused was not true.

This situation was further complicated by the Court's directing the jury's attention—and of course necessarily commanding them to consider—the testimony of Hunt that the money he received from Roberts was delivered to Lieut. Johnson, who also executed two certificates of inspection—one upon the original order form at the time of delivery and another upon the public voucher issued after the claim was filed (T. of R. pp. 136-137).

It must be apparent from the mere statements above made with reference to the charge that the Court erred in so charging the jury.

One other exception to the charge is worthy of notice. It is a fundamental principle of criminal law that proof of guilt must "exclude every reasonable theory under the evidence consistent with innocence." That was embodied in a requested charge as follows:

> "* * * and this proof must exclude every reasonable theory under the evidence consistent with his innocence."

The Court of its own motion struck this from the requested charge, and therefore robbed the charge of its value as offered, upon the question of the degree of proof, leaving it only to the effect that the Government was required to prove the charge "beyond *a* reasonable doubt," the Court also having eliminated the word "all" from that phrase, embodied in the charge as offered.

Conclusion.

This case presents a comedy of errors and inordinate confusion of inferential speculation based upon unrelated, collateral and disconnected incidents.

Only the judiciary has the power to protect the rights, safeguards and liberty of the individual. Any relaxation of this power would be unfortunate.

The writ should be granted.

Respectfully submitted,

L. S. Parsons,
Counsel for Petitioner.

Suite 425, Western Union Building,
Norfolk, Va.